

**Sheet Metal Workers' International Association,
Local Union No. 27 and Donald Appignani.
Case 22-CB-7323**

February 23, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On May 25, 1994, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Bradley Williams, Esq., for the General Counsel.
Robert O'Brien, Esq. (Tomar, Simonoff, Adourian & O'Brien, P.C.), of Haddonfield, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on December 28, 1992, by Donald Appignani, an individual, a complaint was issued against Sheet Metal Workers' International Association, Local Union No. 27 (Respondent or Union) on February 24, 1993.

The complaint alleges essentially that Respondent, which is the exclusive source of referrals to employment, unlawfully failed to follow the objective criteria in its procedures for referral of members, in failing to refer Appignani to two jobs.

Respondent's answer denied the material allegations of the complaint, and on September 29, 1993, a hearing was held before me in Newark, New Jersey.

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Sheet Metal Contractors' Association of Central and Southern New Jersey and Associated Roofers (Association), an organization comprised of employers engaged in the business of sheet metal and roofing, exists for the purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Respondent. The employer-members of the Association have authorized the Association to represent them in negotiating and administering such collective-bargaining agreements.

During the past 12 months, the employer-members of the Association purchased and received at their New Jersey locations goods and materials valued in excess of \$50,000 directly from points outside New Jersey.

Respondent admits, and I find that the employer-members of the Association are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Appignani has been a member of Respondent for 19 years. He first ran for union office in 1983, and won a position as trustee. In 1986, he unsuccessfully ran for the office of business representative against five or six others, including Thomas Stapleton, Respondent's president and business manager. In 1989, Appignani ran for executive board and vacation fund trustee on Stapleton's slate and won. In 1990, he was appointed recording secretary, a position which was vacant, and was elected to that office 2 months later. In June 1992, Appignani ran for president and business manager against Stapleton, and lost.

Appignani testified that in February 1992, he and Jim Schooley, an executive board member, were told by Stapleton that he was not happy that they attended a party for a former Local 27 business representative who became employed by a different union. According to Appignani, Stapleton asked them to resign their positions since they were not "team players."

Stapleton testified that he told Appignani that his attendance at the party was "out of place," but he did not ask him to resign.

Appignani testified that no personal hostility was ever displayed toward him in his dealings with Stapleton or Thomas Kohler, Respondent's business representative. He further stated that he received referrals after these events, in October 1992, and had rejected a referral to a 4- to 6-week job.

B. The Referral System

Respondent admits that, pursuant to the collective-bargaining agreement between it and the Association, it is the sole and exclusive source of referrals of employees to employment with the employer-members of the Association. The contract states that Respondent shall operate an exclusive hiring hall, pursuant to which "members . . . shall be referred . . . on a non discriminatory basis." The contract provides

that an exception to such referrals "can be permitted for recognized specialty skills as currently existing." Further, the contract provides that employers have the right to request former employees.

When contractors need employees, they call the Union. Workers are generally needed for the next day. Respondent's business representatives then utilize the referral or out of work list to assign work to the employees.

Union witnesses Stapleton and Kohler testified that all referrals are generally made from the top of the list, except for the exceptions noted in the contract: skill, and a specific request for an employee.

It is also undisputed that there has been a practice whereby a member who has been employed 20 (up to 24) days, upon his layoff from such employment, goes to the bottom of the referral list. As a result of that practice, upon being called for work, a member will sometimes inquire as to the length of the job offered, and refuse to accept a short job. Any individual called may refuse referrals without penalty. After refusing a referral, his name remains in the same position on the list.

Kohler also testified that he attempts to "equalize" the amount of hours of work among the members so that each person receives an equal share of work before his 20-day limit is reached and his name goes to the bottom of the list. In this regard, Kohler knows who has been referred to work, and how many days they have accumulated.

The referral list is updated about every 2 weeks. Kohler made the calls at issue here. He testified that he occasionally kept notes as to who he called, and who refused referrals, but none were presented at hearing, except for telephone company records of calls, which will be discussed, *infra*.

C. The Referrals

The Brick Hospital Renovation

Respondent admits the complaint allegation that it failed to refer Appignani to employment at the Brick Hospital project.

Appignani testified that in October 1992, he learned that members were being referred to work at Brick Hospital. He stated that he asked Kohler at a union meeting in October why he had not been sent to that job. Kohler responded that it was only a 2-week job. It should be noted that Kohler testified that the job's duration was 18 months.

Two rounds of referrals were made: one in September and one in November.

The September Referral

Appignani was not referred to the Brick Hospital job. Respondent's records showed that the following employees received compensation, and therefore worked, during the following periods, at the Brick Hospital project. They would have been referred some time before the date set forth.

Frank Johannemann and Richard Pucci worked during the period ending September 29, 1992.¹ In view of the fact that Union Agent Kohler gave uncontradicted evidence that Johannemann began work on that project on September 15 or 16, I find that the September 11 referral list, and not the September 23 list, was used. On the September 9 list,

Johannemann is No. 9, Pucci is No. 55, and Appignani was No. 6.

John Christensen worked during the periods ending September 20 and 27 and October 18 and 25. Christensen is No. 147 and No. 135 on the September 11 and September 23 lists, respectively. His name does not appear on the October 16 list. Appignani was No. 4 on the October 16 list.

Robert Thome worked during the periods ending October 18 and 25. He was No. 7 on the October 16 list. Appignani was No. 4.

Union Agent Kohler testified that in referrals to this job, he began at the top of the list and worked his way down. His home telephone bill, which lists the calls made, establishes that a call was made to Appignani on September 15 at 8:09 p.m. Kohler testified that he attempted at that time to refer Appignani to the Brick Hospital, but that when he phoned Appignani's home he was informed by his son that he was not at home. Kohler stated that he left a message that he was calling regarding a job opportunity. He was not called back.

The telephone bill further establishes, and Kohler testified, that at 8:12 p.m. that day he phoned Johannemann, and referred him to the Brick Hospital job.

Thus, Respondent argues that it attempted to refer Appignani first, and when it could not reach him, referred Johannemann. In fact, Kohler testified that Johannemann began work at the Brick Hospital job on September 15 or 16.²

The November Referral

Appignani testified that at the November 1992 union meeting it was announced that the Brick Hospital job's contractor, Olympic Sheet Metal, had lost the contract, and the job was shut down. It was also mentioned that another contractor had been selected, and that additional workers would be hired, in addition to those who had been employed there prior to the shutdown. At that meeting, Appignani told Kohler that he would like to be referred to work there. Appignani did not recall Kohler's reply.

The following employees worked during the period ending November 1, and their positions on the October 16 list are as follows: Christensen (does not appear on the list); Armando Fernandez (No. 21); John Gural (No. 30); Johannemann (does not appear on the list); Mark Mai (No. 63); Pucci (No. 46); James Schooley (No. 9); and Robert Thome (No. 7).³

Appignani is No. 4 on that list.

In addition, Christensen and Thome worked during the period ending November 8, and Pucci worked during the period ending November 12. Christensen, Thome, and Pucci were Nos. 183, 8, and 43, respectively, on the November 6 list. Appignani was No. 5 on that list.

Kohler testified that there were two reasons that others were referred ahead of Appignani for this second round of referrals in November. First, he stated that he phoned

² Since Johannemann received the call in the evening of September 15, it is obvious that he began work the following day.

³ The hearing transcript is in error in stating that Fernandez and Mai worked during the period ending January 1, 1992. The testimony and the Union's records of earnings establish that they worked during the period ending November 1.

¹ All dates hereafter are in 1992 unless otherwise stated.

Appignani on October 4 for a referral to the Brick Hospital job, possibly spoke to his son, and was informed that Appignani was not home. Kohler's phone records show that a call was made to Appignani's home on October 4.

Kohler further testified that another reason that others, such as Gural and Mai were referred before Appignani was because they were willing to accept a short-term job.

The Monmouth County Jail Project

Respondent admits the complaint allegation that it failed to refer Appignani to employment at the Monmouth County Jail project.

In November 1992, the Thomas Barham Company, a mechanical contractor, was awarded a bid to renovate the Monmouth County jail.

Union President Stapleton testified that he learned that the sheet metal subcontract would be awarded to an out-of-state subcontractor. Stapleton called Barham, and asked that a New Jersey contractor be used. He was told that Barham had decided to award the subcontract to an out-of-state contractor.

Stapleton then phoned Monmouth County politician, Freeholder Harry Larrison, and told him that it would be in the best interest of the Union and of area residents if a New Jersey contractor was awarded the job. Larrison said he would call Barham.

Shortly thereafter, a representative of Barham called Stapleton and angrily said that he was called by Larrison. A couple of days later, Stapleton was advised that union contractor Thomas Roofing and Sheet Metal, Inc. was awarded the contract.

Stapleton had another conversation with Larrison in which Larrison asked whether the fact that Thomas Roofing was awarded the job would result in employment for Monmouth County residents. Stapleton said that he would attempt to employ Monmouth County residents as 50 percent of the work force on the job.

Inasmuch as half of Thomas' work force already consisted of his regular crew, all of whom were residents of Atlantic County, 50 percent of the total work force meant that all referrals made by the Union would have to be Monmouth County residents.

Thereafter, referrals to that job were made to Monmouth County residents only. Appignani is not a resident of Monmouth County and was not referred to that job.

Stapleton testified that he invoked article 1, section 2 of the addendum to the collective-bargaining agreement, known as Resolution 78, in departing from the normal referral procedures for this job. That section states as follows:

It is understood that in accordance with Resolution 78, the Local Union Business Manager be empowered to expand on said addendum and specialty agreements or to take whatever steps necessary, including flexible conditions on particular jobs sometimes known as "pin-pointing," to ensure that such work will be captured for our members, and that the Local Union encourages their signatory contractors to cooperate fully on a Local and National level to achieve our goal for full employment for all members.

Appignani testified that at a union meeting, the union representatives said that referrals would begin shortly for that job, which was expected to last 18 months. At the end of the meeting, Appignani asked Kohler if it was possible for him to be referred. Kohler said that he could not because only Monmouth County residents would be referred to that job. When Appignani asked why, he was told to speak to the executive board.

That evening, Appignani spoke to executive board members Andrejko and Sykes, who said they were not aware of any requirement that persons referred to that job be residents of Monmouth County.

Four employees were referred to Thomas Roofing: James Crowley, Daniel Lewis, Brantley Savage, and David Wells.

Crowley and Savage were referred to Thomas during the period ending November 30. The referral list dated November 6 does not bear Crowley's name, but Savage is No. 3 on that list. Appignani is No. 5. Accordingly, if the list had been followed, Savage would have been referred ahead of Appignani, but Appignani would have been referred ahead of Crowley.

In addition, Crowley, Lewis, Savage, and Wells were referred to Thomas during the period ending December 31. The December 17 referral list does not bear the names of Crowley or Savage. Lewis is No. 71, and Wells is No. 177. Appignani is No. 4.

Respondent's explanation for the referrals of Crowley and Savage, whose names were not on the out-of-work lists, is that it had already submitted their names to Thomas for a security clearance which was required in order for them to work at the jail project.

William Barham, the president of Thomas Barham Co., testified that four New Jersey subcontractors, including Thomas Roofing and Sheet Metal, Inc., submitted proposals to Barham to perform the sheet metal work. Barham awarded the sheet metal work to Thomas. He stated that he had no knowledge of any out-of-state company bidding on that work. He further stated that he believed that one of the four bidders, Kennect Company, was a New Jersey company, but was not certain of that.

Barham further stated that he did not believe that Larrison asked him on behalf of the Union to award the project to Thomas. However, he did remember receiving a call from Stapleton but could not recall the substance of the conversation.

Respondent's Other Argument

Respondent also argues that the overall amount of work that Appignani received must be considered in evaluating whether the Act was violated. It argues that the work records of employees on its referral lists from June 1992 to December 1992 show that Appignani worked more hours than 108 union members, but he worked fewer hours than only 60 members, and in addition, 54 members worked no hours during that period of time.

Analysis and Discussion

The complaint alleges that Respondent violated Section 8(b)(1)(A) and (2) of the Act by improperly failing to refer Appignani to two jobs to which he should have been referred ahead of the workers who were referred.

I cannot find that Respondent discriminated against Appignani because of his protected activity. Specifically, I do not find that Appignani's activities in running against Stapleton in a union election caused Respondent to discriminate against him by referring others to work ahead of him, out of order.

First, following the union election which he lost to Stapleton, Appignani received numerous calls referring him to work, actual referrals, and he turned down a lengthy referral. He conceded that no personal hostility was displayed to him by Respondent's officials.

Accordingly, there is no evidence of animus toward Appignani because of his activities in opposition to Stapleton. Even if there was such animus, no nexus has been established between that animus and Respondent's failure to refer him. *Brand Mid-Atlantic, Inc.*, 304 NLRB 853, 855 (1991).

Even in the absence of a specific discriminatory intent, "a Respondent may be found to have violated Section 8(b)(1)(A) and (2) of the Act in each case that it made referrals which did not comport with its established hiring hall procedures." *Plumbers Local 521 (Huntington Plumbing)*, 301 NLRB 27, 30 (1991).

The Board has stated in *Radio-Electronics Officers Union*, 306 NLRB 43, 44 (1992):

[T]he operator of an exclusive hiring hall . . . owes a duty of fair representation to applicants using that hall. As part of its duty of fair representation, the Respondent has an obligation to operate the exclusive hiring hall in a manner that is not "arbitrary or unfair."

"Notwithstanding the absence of specific discriminatory intent, 'any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant . . . inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates [the Act.]'" *Cell-Crete Corp.*, 288 NLRB 262, 264 (1988).

A union may overcome the inference that the effect of its action is to encourage union membership, by acting pursuant to a valid union-security clause or by showing that its action was necessary to the performance of its representative function. *Radio-Electronics*, supra.

I find and conclude that Respondent has met its burden with respect to the Brick Hospital project and the Monmouth County jail job.

Regarding the Brick Hospital, Union Agent Kohler presented uncontradicted evidence that he made referrals to this job from the top of the list, and that he phoned Appignani on September 15 in order to refer him to that job. Appignani was number 6 on the September 11 list. Kohler's home telephone bill establishes that a call was made to Appignani on that date. Further, I credit Kohler's testimony, and the phone bill establishes, that he then called Johannemann, No. 9 on that list, and referred him to employment.⁴ Kohler further testified that Johannemann began work on the project on September 16.

⁴The length of the phone calls adds support to the referral to Johannemann. Kohler's call to him encompassed 5 minutes. The message left with Appignani's son took 1 minute.

Accordingly, a proper referral to Appignani for the Brick Hospital project was attempted on September 15, prior to the referral of anyone further down the list. Thus, Appignani was called ahead of Johannemann and the others who were called for work in September, such as Pucci and Christensen.

As to the November referral, I credit Union Agent Kohler's testimony that he phoned Appignani on October 4 for referral to that job, and was informed that Appignani was not home. Kohler's telephone bill confirms that a call was made to Appignani's home on that date. Others, who worked during the periods ending October 18 and 25, November 1, 8, and 12, were apparently referred after Kohler placed the October 4 call to Appignani.

Accordingly, I find that Respondent followed its established practice in referring persons on the out-of-work list in the order in which they are listed thereon. Thus, calls were placed to Appignani, in an attempt to refer him to the Brick Hospital job, ahead of the others who were ultimately referred to that job.

I cannot credit Appignani's testimony that Kohler told him at a union meeting in October that he was not referred because the job was only scheduled for 2 weeks. The Brick Hospital project, in fact, lasted 18 months, and Appignani was phoned on two occasions for referral to that project.

General Counsel bears the burden of proving that the out-of-order referrals were improper. *Electrical Workers IBEW Local 211 (Atlantic Division NECA)*, 280 NLRB 85, 111 (1986). Accordingly, I find that the General Counsel has not met his burden in this regard.

Regarding the Monmouth County jail project, I credit Stapleton's testimony that he assured Freeholder Larrison that he would attempt to place Monmouth County residents on the job in return for Larrison's help in having the contract awarded to a New Jersey contractor.⁵ Appignani concedes that he was told by Kohler that only Monmouth County residents would be referred to that job.⁶

Pursuant to Stapleton's pledge to Larrison, only Monmouth County residents were referred to the project.

Respondent's failure to refer Appignani to this project was a departure from its established hiring hall rules requiring that employees be referred from the top of the list. Respondent has, however, overcome the inference that the failure to refer Appignani encourages union membership by basing its referrals to this project upon Resolution 78.

Resolution 78 permits Respondent to "take whatever steps necessary" in order to "capture" work for its members, in order to ensure full employment for them. Stapleton acted pursuant to this resolution in undertaking to ensure that Respondent's members received work at this project.

It is clear that in interceding for Respondent, Larrison sought to obtain work for his constituents, Monmouth County residents. Accordingly, Stapleton pledged that 50 percent of the work force would be Monmouth County residents. If Stapleton had not sought to obtain the work through Larrison, a nonunion contractor would have been awarded the job. Thus, Respondent undertook this action in further-

⁵In this regard, I note that Barham conceded that he received a call from Stapleton, and also was uncertain whether one bidding company was a New Jersey contractor.

⁶The fact that, according to Appignani's testimony, two executive board members were not aware of this arrangement does not mean that it was not effective.

ance of its representative function to benefit the membership as a whole, pursuant to Resolution 78.

I accordingly find that the limitation of referral to this project to Monmouth County residents was necessary to the effective performance of Respondent's representative function, and in aid of the Union's membership as a whole. *Radio-Electronics*, supra.

General Counsel argues that, even assuming that the restriction of referrals to Monmouth County residents was proper, referrals were made to Crowley and Savage which were improper because their names were not on the appropriate referral list. I reject this argument. That fact is irrelevant since, in any event, Appignani was not eligible for these referrals since he was not a resident of Monmouth County. In addition, Respondent has presented credible evidence that the names of the four individuals who were referred were previously submitted for security clearances to the contractor and, according to Respondent, had priority for referral.

Accordingly, Respondent's invocation of Resolution 78, a collectively bargained exception to the hiring hall practice of referring employees in the order of their listing on the out-of-work list, represented action—the obtaining of work for union members which they would not have received had the contract been awarded to an out-of-state contractor—which was necessary to the effective performance of its representative function.

I accordingly find that no violation of the Act has been committed.

CONCLUSIONS OF LAW

1. The employer-members of the Sheet Metal Contractors' Association of Central and Southern New Jersey and Associated Roofers are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers' International Association, Local Union No. 27, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act by refusing to refer Donald Appignani for employment, as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

It is ordered that the complaint be dismissed in its entirety.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.